Supreme Court, U. S.
FILED
JUN 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1571

MARTHA WILEY, MOTHER AND NEXT OF KIN OF FRED LEE BERRY, A DECEASED MINOR,

Petitioner,

V.

MEMPHIS POLICE DEPARTMENT, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLIFFORD D. PIERCE, JR.
ARTHUR J. SHEA
CHARLES V. HOLMES
314 City Hall
125 North Main Street
Memphis, TN 38103
Attorneys for Respondents

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
Facts	2
ARGUMENT IN OPPOSITION TO REASONS SET FORTH FOR GRANTNG CERTIORARI	2
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:	Page
Ashcroft v. Mattis, No. 76-1179, (1976)	2
Beech v. Melancon, 465 F.2d 425 (6th Cir 1972), Cert Den. 409 U.S. 1114, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973)	5, 6
Castaneda v. Partida, —— U.S. ——, 45 U.S.L.W. 4302 (March 27, 1977)	10
Clark v. United States, 193 F.2d 294, (5th Cir. 1951)	6
Cunningham v. Ellington, 323 F.Supp. 1072, (W.D.Tenn. 1971)	5, 6, 9
Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 167, 14 L.Ed.2d 510 (1965)	3
Howell v. Catoldi, 464 F.2d 272 (3rd Cir. 1972)	7
Mattis v. Schnarr, 547 F.2d 1007, (8th Cir. 1976)	2
Washington v. Davis. 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)	10
STATUTES AND REGULATIONS:	
18 U.S.C.A. Sec. 242	6
Tenn. Code Ann. Sec. 40-808	5
OTHER AUTHORITIES:	
Modern Penal Code, Tentative Draft No. 8 (1958), Comments on Section 3.07, p. 60	8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1571

MARTHA WILEY, MOTHER AND NEXT OF KIN OF FRED LEE BERRY, A DECEASED MINOR,
Petitioner,

V.

MEMPHIS POLICE DEPARTMENT, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the trial court was not guilty of clear error in concluding that the defendant officers were justified in the use of deadly force to apprehend the petitioner's son, a fleeing felon?

2. Whether the deadly force policy of the City of Memphis is unconstitutional under the Fourth, Eighth or Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Facts

Respondents reject the statement of facts as presented in the petition, pp. 5-11, as it is in some respects misleading. For a more complete and accurate exposition of the facts presented in evidence, respondents recommend for the Court's consideration here the summary of facts as witten in paragraphs 11, 12, 13, 14 and 15 of the Memorandum Opinion rendered by the District Court, pp. 19a-22a of the Appendix to the petition.

ARGUMENT IN OPPOSITION TO REASONS SET FORTH FOR GRANTING CERTIORARI

It should be noted from the outset that one of petitioner's original grounds as to why certiorari should be ganted is no longer applicable. That being, of course, the claim that the Sixth Circuit's opinion herein is in direct conflict with the Eight Circuit, per **Mattis v. Schnarr**, 547 F.2D 1007 (8th Cir. 1976).

Since the writing of Petitioner's Brief, this Court has set aside the above ruling of the Eight Circuit by Summary Action upon procedural grounds, **Ashcroft v. Mattis** No. 76-1179 (May 17, 1977), thereby ending any conflict which may have existed. This being true, the opinion herein is no longer in conflict, as far as we know, with any other Circuit of the United States Court of Appeals on the issue of the constitutionality of the use of deadly force by police officers in apprehending a fleeing felon.

I.

The first "reason" given as to why this Court should grant certiorai is that the use of deadly force by the officers herein deprived petitioner's sons of two fundamental rights, the right to life and right to trial, without due process of law and without showing circumstances wherein the State's or City's interests were so compelling to override those rights.

While the above-mentioned rights are admittedly fundamental rights specifically protected by the Constitution, they are not absolute. There must be a balancing of the public interest involved and the individual's "rights". **Griswold v. Connecticut**, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Furthermore, while petitioner claims that the individual rights involved herein involve the right to life and right to trial, it could be argued that the only right the fleeing felon is denied by such a deadly force policy is the "right to flight" which is not constitutionally protected.

If, however, the right to life and right to trial are involved herein, they must be weighed in this particular case against the interest of the state or city in apprehending criminals and in aiding police officers in the fulfillment of this duty. The Court must also be cognizant of the fact that restricting the means available to police officers in effecting an arrest reduces the effectiveness of the officrs in the pursuit of their duties and endangers their lives. The dangers faced by police officers should be taken into consideration, regardless of the nature of the felony involved.

Petitioner argues in this particular case that because the crime committed by petitioner's son was one against property, as opposed to a crime against persons or a crime of violence, the officers herein should have known that he posed no threat to their safety or to the safety of the public; and as such should not have been authorized to use deadly force to apprehend him even as a last resort.

The validity of this argument must be questioned, for it is difficult to see how an officer can determine in a split second whether a fleeing felon is going to pose a threat to the community unless the person fleeing makes some announcement to that effect. For example, during the burglary of one of the stores involved herein, petitioner's son and two other male blacks confiscated several rifles and ammunition and "stashed" them near the drainage ditch where they ultimately attempted their escape. While such a crime, third degree burglary, is a crime against propety, as opposed to a crime against persons, the taking of such items certainly poses a threat to the public at large and to the police officers involved. Had they not reacted quickly to the emergency, such rifles and ammunition may have been used against the officers, or even members of the general public.

Thus, we have a good example of why making any distinction between crimes of violence or against persons and crimes against property is arbitrary and not necessarily a rational basis for determining a policy of when deadly force may be used to apprehend fleeing felons.

It is respondents' position that the felony versus misdemeanor classification used by the Memphis Police Department in determining when deadly force may be used is reasonable and is as free from abitrariness as the classification suggested by petitioner.[1]

As stated previously the rights asserted by the petitioner herein must be weighed against the interest of the state in apprehending criminals and in aiding police officers in the fulfillment of their duties. It appears that the Tennessee State Legislature long ago determined that the interests of the State in apprehending fleeing felons overrides any individual rights involved, through their enactment of Tennessee Code Annotated Sec. 40-808.[2] The deadly force policy of the Memphis Police Department at the time of this lawsuit was authorized by, and conformed to, Tennessee Code Annotated Sec. 40-808.

It is complained by petitioner that the Sixth Circuit Opinion herein contains no discussion of the due process issue and that it was summarily disposed of by citation to **Cunningham v. Ellington**, 323 F. Supp 1072 (W.D. Tenn. 1971), and **Beech v. Melancon**, 465 F.2d 425 (6th Cir. 1972), Cert. Den. 409 U.S. 1114, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973).

The obvious reason for such summary treatment is that less than a year before this incident occurred the constitutionality of Tennessee Code Annotated Sec. 40-

1 That classification being felonies involving violence or self-defense versus property crimes.

2 Tennessee Code Annotated Sec. 40-808 — If after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest.

808 was upheld in the Sixth Circuit by a three-judge District Court consisting of Circuit Judge Harry Phillips and District Judges Bailey Brown and Robert M. McRae, Jr., in **Cunningham v. Ellington, supra,** and later by the Sixth Circuit Court of Appeals itself in **Beech v. Melancon, supra.** For this reason the Court apparently did not deem it necessary to discuss the issue at any length.

II.

Petitioner claims that the Memphis deadly force policy authorizes, and in this case resulted in, the infliction of cruel and unusual punishment in violation of the Eighth Amendment. It certainly cannot be argued that the Eighth Amendment was not adopted to prevent inhuman and tortuous punishment. Respondents' position, however, is that we are not dealing with punishment.

This precise issue was presented in the case of **Cunningham v. Ellington, supra,** which involved Tennessee Code Annotated Sec. 40-808, wherein the Court held that the use of force in effecting the arrest of a fleeing felon was not punishment. In **Cunningham** the Court reasoned that the primary purpose behind the authorization to use all necessary force to effect an arrest is to provide police officers with adequate means to apprehend suspects. That is, the purpose was apprehension as opposed to punishment.

It should also be noted that an officer in effecting an arrest cannot use any force for the purpose of punishing a person and to do so is a crime under 18 U.S.C.A. Sec. 242. **Clark v. United States,** 193 F.2d 294 (5th Cir. 1951).

Further, the use of force in apprehending a fleeing

felon could only rise to the level of a cruel and unusual punishment if it were unreasonable and unnecessary under the circumstances. The extent of injuries received does not necessarily determine or affect the constitutionality of the force employed. **Howell v. Catoldi,** 464 F.2d 272 (3rd Cir. 1972). Thus, if the force is unreasonable and unnecessary for any legitimate aim, its rationale then becomes one of punishment. This standard of reasonable necessity is precisely what is embodied in the Memphis Police Department's deadly force policy. Therefore, on its face it cannot be said that such policy inflicted cruel and unusual punishment.

Petitioner states that "(t)he justification offered by the Memphis police officials shows that the use of deadly force (in apprehending fleeing felons) is punishment." The transcript herein simply does not back up this statement.

Petitioner further states at page 19 of her petition:

"High police officials testified at trial that to their belief the MPD deadly force policy, like the death penalty, was designed and serves as a deterrent (C.aa.92, 104, 106-07, 137-138)."

Reading the pages cited in support of that statement, we find that Jay W. Hubbard, former Director of Police, actually testified that the Memphis Police Department "(doesn't) apply deadly force as a deterrent" but he goes on to say that his own pesonal belief is that such a policy serves as a deterrent to serious crime. (See CAA. 92, 104, 106-07).

The only other testimony included within the pages cited by petitioner is that of a police official who testi-

fied that he believed the deadly force policy was a deterrent to people running from the police. (See C. AA. 137-138).

In discussing the Eighth Amendment issue further, the petitioner quotes Professor Mikell, who at the 1930 ALI proceedings posed the rhetorical question, "May I ask what we are killing him for . . .?"

The opposing view was stated by Professor Waite when he, in opposing the passage of the Modern Penal Code Rule, said:

> "If we pass ISec. 3.07(2) (b)I we say to the criminal 'you are foolish. No matter what you have done you are foolish if you submit to arrest. The officer dare not take the risk of shocting at you. If you can outrun him, outrun him. . . . If you are faster than he is, you are free, and God bless you'. I feel entirely unwilling to give that benediction to the modern criminal." Model Penal Code, Tentative Draft Nc. 8 (1958), comments on section 3.07, p. 60.

III.

As to the Fourth Amendment issue discussed by the petitioner, respondents concur that we have found no case testing the use of deadly force to arrest fleeing felony suspects against the Fourth Amendment.

Even if this Court were to accept the premise that the Fourth Amendment applies to the type of situation we are faced with herein, we must again reach the question of whether or not the use of deadly force to apprehend petitioner's son was an unreasonable seizure.

We again contend that the policy followed by the defendant officers was reasonable.

In **Cunningham v. Ellington, supra,** the Court described the reasonable use of force as follows:

> ". . . an officer may use force that may result in death in preventing the escape of a person that he is attempting to arrest if (1) he reasonably believes that the person has committed a felony and (2) he notifies the person that he intends to arrest him, and (3) he reasonably believes that no means less than such force will prevent the escape."

Respondents contend that the officers in question followed these guidelines and, therefore, cannot be considered to have acted unreasonably even in the light of the Fourth Amendment argument.

IV.

Petitioner complains that the Sixth Circuit rejected her racial discrimination claims by merely quoting the District Court's finding that there was no racial motivation in the application of Memphis Deadly Force Policy.

It is apparent that the Sixth Circuit, after reviewing the transcript of the case, was of the opinion that the evidence supported the finding of the District Court that there was no showing that racial motivation was involved in the application of the Deadly Force Policy.

In making its findings on this matter, the District Court explained in detail why it did not give much weight to the statistical evidence presented by petitioner. The Court explained in detail why it did not give much weight to what proportion of blacks or whites, sought to be ar-

rested while in the act of burglary or robbery, attempted to flee or avoid arrest by police officers.

Furthermore, the District Court pointed out that petitioner argued and presented proof for the proposition that more blacks are disposed to flee, especially young blacks, because of their fear and-or mistrust of police. This being true, the Court reasoned that any disparity which may be evidenced by such statistics as to the use of deadly force could logically be explained and, therefore, be rejected by the Court as evidence of a discriminating application of a lawful policy by police.

The above being true, coupled with knowledge that courts have accepted the proposition that an official act is not unconstitutional solely because it has a racially proportionate impact, **Castaneda v. Partida,** —— U.S. ——, 45 U.S.L.W. 4302, 4305 (March 27, 1977), **Washington v. Davis,** 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), such statistical evidence by itself has no binding effect upon the Courts herein.

CONCLUSION

Respondents respectfully submit that on the basis of the foregoing and the fact that the decision of the Sixth Circuit herein does not conflict with any decision of this Court or any other Court of Appeals, the writ should be denied.

Respectfully submitted,

CLIFFORD D. PIERCE, JR.
ARTHUR J. SHEA
CHARLES V. HOLMES

314 City Hall
125 North Main Street
Memphis, TN 38103
Attorneys for Respondents